APL-2019-147

To Be Argued By:
BRIAN D. GINSBERG
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Court of Appeals of the State of New York

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
FRED JOHNSON, DIN # 09A1104, NYSID # 04899722M,

Petitioner-Appellant,

v.

SUPERINTENDENT, ADIRONDACK CORRECTIONAL FACILITY;
AND NEW YORK STATE DEPARTMENT OF CORRECTIONS
AND COMMUNITY SUPERVISION,

Respondents.

CORRECTED BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

QUESTIONS PRESENTED 3

STATEMENT OF THE CASE 4

A. Petitioner's Criminal History 4

B. Petitioner's Conditional Grant of Parole 6

C. Petitioner Fails to Obtain a SARA-Compliant Residence 8

D. Supreme Court Denies Habeas Relief and the Third Department Affirms 10

E. Petitioner's Release on Parole Followed by His Arrest on New Persistent Sexual Abuse Charges 12

ARGUMENT 13

POINT I

THE COURT SHOULD DISMISS THIS APPEAL AS MOOT 13

POINT II

IF THE COURT REACHES THE MERITS, IT SHOULD AFFIRM BECAUSE RESPONDENTS' APPLICATION OF THE SARA RESIDENCY REQUIREMENT TO PETITIONER COMPORTED WITH SUBSTANTIVE DUE PROCESS 17

A. Petitioner's Liberty Interest in Parole Release Did Not Implicate a Federal Constitutional Fundamental Right. 17

TABLE OF CONTENTS (cont'd)

PAGE

ARGUMENT POINT II (cont'd)

B. To Pass Federal Constitutional Muster, the SARA Residency Requirement as Applied to Petitioner Need Only Have Had a Rational Basis. 22

C. The SARA Residency Requirement Was Rationally Related to the Legitimate Governmental Interest in Protecting Children from Sex Crimes. 25

1. Petitioner Was Rationally Regarded as Posing an Appreciable Risk of Committing Sex Crimes Against Children..... 26

2. The SARA Residency Requirement Was Rationally Regarded as Mitigating the Risk Petitioner Posed..... 35

D. DOCCS Satisfied Its Duty to Assist Petitioner in Obtaining SARA-Compliant Housing, But Even a Breach Would Not Have Rendered the Residency Requirement Irrational..... 37

E. The Rationality of SARA's Residency Requirement Shows that Petitioner Was Likewise Afforded the Substantive Due Process Guaranteed by the State Constitution. 40

CONCLUSION 42

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Affronti v. Crosson,
95 N.Y.2d 713 (2001),
cert. denied sub nom., *Affronti v. Lippman*, 534 U.S. 826 (2001) 25, 36

Anonymous v. City of Rochester,
13 N.Y.3d 35 (2009) 23, 24, 25

Cooper v. Morin,
49 N.Y.2d 69 (1979),
rearg. denied, 49 N.Y.2d 801,
cert. denied sub nom., *Lombard v. Cooper*, 446 U.S. 984 (1980) 41

DeShaney v. Winnebago County Dept. of Social Servs.,
489 U.S. 189 (1989) 21

Doe v. Miller,
405 F.3d 700 (8th Cir. 2005),
reh'g denied, 2005 U.S. App. LEXIS 13115 (8th Cir. June 30, 2005), *cert.* denied, 546 U.S. 1034 (2005) 34

Foucha v. Louisiana,
504 U.S. 71 (1992) 21

Graves v. Thomas,
450 F.3d 1215 (10th Cir. 2006) 19

Green v. McCall,
822 F.2d 284 (2d Cir. 1987) 22

Greenholtz v. Inmates of Neb. Penal & Corr. Complex,
442 U.S. 1 (1979) 19

Hernandez v. Robles,
7 N.Y.3d 338 (2006) 41

TABLE OF AUTHORITIES (cont'd)

CASES (CONT'D) **PAGE(S)**

Hewitt v. Helms,
459 U.S. 460 (1983) 21

Kendall v. Balcerzak,
650 F.3d 515 (4th Cir.),
cert. denied, 565 U.S. 943 (2011) 19

Lilley v. Platt,
17 Conn. Supp. 101 (Conn. Super. Ct. 1950) 20

Lucas v. Scully,
71 N.Y.2d 399 (1988) 41

Mark G. v. Sabol,
93 N.Y.2d 710 (1999) 17

Matter of Arroyo v. Annucci,
61 Misc. 3d 930 (Sup. Ct. Albany County 2018) 14

Matter of Devine v. Annucci,
150 A.D.3d 1104 (2d Dept. 2017) 11

Matter of Gonzalez v. Annucci,
32 N.Y.3d 461 (2018) 38

Matter of Hearst Corp. v. Clyne,
50 N.Y.2d 707 (1980) 14

Matter of Rizo v. New York State Bd. of Parole,
251 A.D.2d 997 (4th Dept.),
lv. denied, 92 N.Y.2d 811 (1998) 22

Matter of Russo v. New York State Bd. of Parole,
50 N.Y.2d 69 (1980) 19

TABLE OF AUTHORITIES (cont'd)

CASES (CONT'D) **PAGE(S)**

Matter of Williams v. Department of Corr. & Community Supervision,
43 Misc. 3d 356 (Sup. Ct. N.Y. County 2014),
aff'd, 136 A.D.3d 147 (1st Dept. 2016),
lv. dismissed, 29 N.Y.3d 990 (2017) 14-15

Meachum v. Fano,
427 U.S. 215 (1976) 19

Moore v. East Cleveland,
431 U.S. 494 (1977) 17

Morrissey v. Brewer,
408 U.S. 471 (1972) 22

Myers v. Schneiderman,
30 N.Y.3d 1,
rearg. denied, 30 N.Y.3d 1009 (2017) 11, 18, 23, 25

Palko v. Connecticut,
302 U.S. 319 (1937) 17

People ex rel. Negron v. Superintendent, Woodbourne Corr. Facility,
APL-2019-00091 ..... 8n

People ex rel. Ortiz v. Breslin,
183 A.D.3d 577 (2d Dept. 2020),
on appeal, APL-2020-00087 15

People v. Benson,
132 A.D.3d 1030 (3d Dept.),
lv. denied, 26 N.Y.3d 913 (2015) 31

People v. Charles,
162 A.D.3d 125 (2d Dept.),
lv. denied, 32 N.Y.3d 904 (2018) 30

TABLE OF AUTHORITIES (cont'd)

CASES (CONT'D) — PAGE(S)

People v. Gonzalez,
48 A.D.3d 284 (1st Dept. 2008),
lv. denied, 10 N.Y.3d 711 (2008) 31

People v. Hackrott,
170 A.D.3d 1646 (4th Dept.),
lv. denied, 33 N.Y.3d 908 (2019) 31

People v. Knox,
12 N.Y.3d 60,
cert. denied, 558 U.S. 1011 (2009) 17-18, 25, 26, 29

People v. LaValle,
3 N.Y.3d 88 (2004) 40

People v. Meckwood,
20 N.Y.3d 69 (2012) 31

People v. Moultrie,
147 A.D.3d 800 (2d Dept.),
lv. denied, 29 N.Y.3d 908 (2017) 31

People v. Parilla,
109 A.D.3d 20 (1st Dept.),
lv. denied, 21 N.Y.3d 865 (2013) 31

People v. Walker,
81 N.Y.2d 661 (1993) 25

People v. Wheeler,
144 A.D.3d 1341 (3d Dept. 2016) 33

Port Jefferson Health Care Facility v. Wing,
94 N.Y.2d 284 (1999),
cert. denied, 530 U.S. 1276 (2000) 25

TABLE OF AUTHORITIES (cont'd)

CASES (CONT'D) **PAGE(S)**

Regents of Univ. of Mich. v. Ewing,
474 U.S. 214 (1985) 19

Reno v. Flores,
507 U.S. 292 (1993) 18, 21

Sandin v. Conner,
515 U.S. 472 (1995) 21

Steele v. Cicchi,
855 F.3d 494 (3d Cir. 2017) 19

United States v. Salerno,
481 U.S. 739 (1987) 21

Vasquez v. Foxx,
895 F.3d 515 (7th Cir. 2018),
reh'g denied, 2018 U.S. App. LEXIS 22626 (7th Cir. Aug. 14,2018),
cert. denied, 139 S. Ct. 797 (2019) 36

Victory v. Pataki,
814 F.3d 47 (2d Cir. 2016) 18, 22

Wallace v. State of N.Y.,
40 F. Supp. 3d 278 (E.D.N.Y. 2014),
appeal dismissed as lacking basis in law or fact,
Case No. 14-3781, Dkt. No. 36 (2d Cir. Jan. 14, 2015)
..... 15, 26, 27-28

Washington v. Glucksberg,
521 U.S. 702 (1997) 17, 18, 20, 21

TABLE OF AUTHORITIES (cont'd)

CASES (CONT'D) **PAGE(S)**

Weems v. Little Rock Police Dept.,
453 F.3d 1010 (8th Cir. 2006),
reh'g denied sub nom., Weems v. Johnson, 2006 U.S. App. LEXIS 21238 (8th Cir. Aug. 16, 2006),
cert. denied, 550 U.S. 917 (2007) 26

Wisholek v. Douglas,
97 N.Y.2d 740 (2002) 14

Wooten v. Campbell,
49 F.3d 696,
reh'g denied, 58 F.3d 642 (11th Cir.),
cert. denied, 516 U.S. 943 (1995) 19

CONSTITUTIONAL PROVISIONS

N.Y. Const., art. I, § 6 ..... 40, 41

U.S. Const., amend. XIV § 1 ..... 17, 21, 40, 41

STATUTES

42 U.S.C. § 1983 15

Correction Law
§ 2 15
§ 73 16
§ 168-l 4, 5, 11, 27, 33
§ 168-h 5, 27
§ 168-n 5, 27, 33
§ 168-o 5, 27
§ 201 ..... 12, 37, 38

C.P.L.R. § 5601 ..... 2, 12

TABLE OF AUTHORITIES (cont'd)

STATUTES (CONT'D) **PAGE(S)**

Executive Law § 259-c 8, 18, 32

Penal Law § 220.00 ..... 7, 8n

Sexual Assault Reform Act ..... *passim*

Sex Offender Registration Act 1, 4, 26, 29

MISCELLANEOUS

Edward E. Rhine, *The Present Status and Future Prospects of Parole Boards and Parole Supervision*, in *The Oxford Handbook of Sentencing and Corrections* 627 (Joan Petersilia & Kevin R. Reitz, eds. 2012) 20

John Caher, *Effect of Risk Assessment Rule on Parole Decisions Is Unclear*, N.Y.L.J., Apr. 30, 2012, at 1 ..... 6, 33

Melanie Clark Mogavero & Leslie W. Kennedy, *The Social and Geographic Patterns of Sexual Offending: Is Sex Offender Residence Restriction Legislation Practical?*, 12 Victims & Offenders 401 (2017) 37

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TABLE OF AUTHORITIES (cont'd)

MISCELLANEOUS (CONT'D) **PAGE(S)**

New York State Department of Corrections and Community Supervision, *Inmate Lookup*, http://nysdoccslookup.doccs.ny.gov 12, 39

New York State Unified Court System, *WebCriminal Case Identifier Search*, https://iapps.courts.state.ny.us/webcrim_attorney/CaseIdentifierSearch..... 13

Patrick Lussier et al., *Generality of Deviance and Predation: Crime-Switching and Specialization Patterns in Persistent Sexual Offenders*, in *Violent Offenders: Theory, Research, Policy, and Practice* 97 (Matthew DeLisi & Peter J. Conis, eds. 2008) 34

PRELIMINARY STATEMENT

The Sexual Assault Reform Act ("SARA") bars the New York State Department of Corrections and Community Supervision ("DOCCS") from releasing on parole certain inmates who have been convicted of sex offenses unless they first obtain a residence that is not within 1,000 feet of any school. This appeal concerns petitioner Fred Johnson's claim that the SARA requirement—which undisputedly applied to him as a statutory matter—violated the federal and New York State constitutional guarantees of substantive due process.

Petitioner is a level-3 sex offender under the Sex Offender Registration Act ("SORA"), meaning that he poses a high risk of recidivism and a threat to public safety. For sexual acts he committed against a woman on the New York City subway in 2008, he was convicted of persistent sexual abuse and sentenced to an indeterminate term of two years' to life imprisonment in DOCCS custody. In 2017, he was granted parole subject to the SARA residency requirement.

While petitioner was waiting for a SARA-compliant residence to become available, he filed a petition for writ of habeas corpus in Supreme Court, Essex County, alleging that respondents DOCCS and the

Superintendent of Adirondack Correctional Facility, where he was being housed, were confining him in violation of substantive due process. Supreme Court denied the petition and the Appellate Division, Third Department affirmed. Petitioner appealed to this Court under C.P.L.R. 5601(b)(1) on the ground that the case directly involves a constitutional question.

In 2019, while petitioner's appeal in this Court was pending, he was released to a SARA-compliant residence. Shortly after his release, however, he was taken into local custody in New York City on new persistent sexual abuse charges.

As an initial matter, the Court should dismiss this appeal as moot. The relief petitioner sought in his habeas petition, *i.e.*, release on parole from DOCCS custody, was in fact received. And although petitioner has since been taken into local custody, he is being held on new criminal charges—not because of anything having to do with SARA. There is thus no longer any live controversy between petitioner and respondents. Further, the exception under which moot cases may be adjudicated does not apply, because constitutional challenges like petitioner's have not been evading judicial review.

If the Court does reach the merits of this appeal, it should affirm, because the application of SARA's residency requirement to deny petitioner release on parole until he obtained compliant housing comported with substantive due process. Namely, the requirement that he obtain a SARA-compliant residence before he could be released was rationally related to the legitimate purpose of protecting children from sex crimes, because it was rational to regard petitioner as posing a risk of committing sex crimes against children and it was rational to regard the requirement that he not live within 1,000 feet of any school as mitigating that risk.

QUESTIONS PRESENTED

1. Should the Court dismiss this appeal as moot?

2. If the Court does reach the merits, should it affirm because respondents' application of the SARA residency requirement to deny petitioner release on parole until he obtained compliant housing comported with substantive due process?

STATEMENT OF THE CASE

A. Petitioner's Criminal History

Petitioner is a 62-year old man with an extensive criminal history in the State of New York, including an extensive history of sex offenses all involving a common modus operandi: rubbing his penis against women on the subway. (R. 19-20, 68, 78.) Between 1983 and 2002, he was convicted of sexual abuse in the third degree, a misdemeanor, more than 20 times for this behavior. (R. 19.) In 2002, he did it again and was convicted of persistent sexual abuse, a felony, for which he was sentenced to a year in jail. (R. 19.)

In 2003, shortly after he was released from jail, petitioner committed the same act, and was once again convicted of persistent sexual abuse. (R. 19.) He was sentenced to an indeterminate term of two to four years' imprisonment in DOCCS custody. (R. 19.)

In connection with that persistent sexual abuse conviction, the sentencing court designated petitioner a level-3 sex offender under SORA. (R. 19.) Level 3 is SORA's most serious risk-level designation, indicating that "the risk of repeat offense is high and there exists a threat to the public safety." Correction Law § 168-l(6)(c). The sentencing court

may impose a level-3 designation only after receiving a recommendation prepared by the New York State Board of Examiners of Sex Offenders, a panel of experts in sex offender behavior and treatment, *id.* § 168-l(1), (6); holding an adversarial hearing at which the district attorney and the offender are invited to respond to the board's recommendation, *id.* § 168-n(3); and concluding that the designation is warranted by clear and convincing evidence, *id.* Once imposed, a level-3 designation continues unless and until, upon the offender's application, the court finds that clear and convincing evidence warrants a modification. *Id.* §§ 168-h(2), 168-o(2).

In 2008, less than one month after being released from DOCCS custody, petitioner, then just shy of 50 years old, yet again committed what had become his pattern sexual act of rubbing his penis against a woman on the subway. (R. 19, 68.) He was yet again convicted of persistent sexual abuse. (R. 19.) This time, he was sentenced to an indeterminate prison term of two years to life in DOCCS custody. (R. 19, 68-69.) In 2015, the Board of Examiners of Sex Offenders reviewed petitioner's case file and opined that he "does not appear to be able to control his impulse to rub his penis against female strangers." (R. 20.)

B. Petitioner's Conditional Grant of Parole

In June 2017, petitioner, then 59 years old, appeared before the New York State Board of Parole seeking discretionary parole release. (R. 72.) During the appearance, he acknowledged his extensive history of sex crimes (R. 73, 78-80), explaining it as a function of his belief that "if I see a woman wearing a tight dress or tight pants, in my mind I was thinking she wants a strange man or someone to rub up against her" (R. 74-75). Petitioner asserted, however, that after completing sex offender rehabilitation programs while incarcerated, this belief was "controlled much more." (R. 74.)

Along similar lines, the Parole Board observed that petitioner had scored favorably on the Correctional Offender Management Profiling for Alternative Sanctions ("COMPAS") assessment, a computer program that uses inmates' biographical information, as well as their responses to a questionnaire that asks them to assess some of their own relevant strengths and weaknesses, to predict how they would behave if released. *See* John Caher, *Effect of Risk Assessment Rule on Parole Decisions Is Unclear*, N.Y.L.J., Apr. 30, 2012, at 1 [hereinafter Caher, *Risk Assessment Rule*]. Specifically, the COMPAS had rated petitioner a low

risk of felony violence, arrest, or absconding from supervision. (R. 75.) It was also noted that petitioner had gone approximately three years without having been found guilty of any prison disciplinary infractions. (R. 78.)

Shortly after petitioner's appearance, the Parole Board issued a decision granting him parole with an "open date" of August 10, 2017. (R. 81 [capitalization omitted].) This meant that he would be released as soon after that date as DOCCS approved a plan for his reintegration into the community, including a suitable residence. DOCCS, *Community Supervision Handbook: Questions and Answers Concerning Release and Community Supervision*, at 15 (May 2019), https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervion_Handbook.pdf. Petitioner was prescribed a number of conditions he would have to obey while on parole, some of which made certain residences unsuitable. Among them was the condition that he not knowingly enter any "school grounds" as defined by Penal Law § 220.00(14), *i.e.*, essentially any area within 1,000 feet of a school.[1] (R. 84.) The Parole Board prescribed this

[1] The Parole Board's decision contains a typographical error describing "school grounds" as the area within "one feet" of a school. (R. 84.) However, the decision correctly states that school grounds is

condition pursuant to SARA, a series of enactments designed, in relevant part, to protect children from the dangers posed by sex offenders. Executive Law § 259-c(14) of SARA requires the school-grounds condition for the parole release of, among other inmates, inmates who are level-3 sex offenders and are serving a sentence for one or more offenses enumerated in the provision, including persistent sexual abuse.[2]

In light of the school-grounds condition, the Parole Board advised petitioner that he would not be released on parole "until a residence is developed and it is verified that such address is located outside the Penal Law definition of school grounds." (R. 84.)

C. Petitioner Fails to Obtain a SARA-Compliant Residence

In July 2017, DOCCS staff met with petitioner to request possible residences to investigate for suitability. (R. 101.) Petitioner proposed to live with his twin brother in South Carolina. (R. 101.)

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defined by Penal Law § 220.00(14) (R. 84), which in turn makes clear that the relevant radius is "one thousand feet."

[2] The precise extent to which SARA requires the school-grounds condition for the parole release of other inmates is being considered by this Court in *People ex rel. Negron v. Superintendent, Woodbourne Correctional Facility*, APL-2019-00091.

In September 2017, a DOCCS parole officer contacted petitioner's brother by telephone and learned that he was renting his home, was married, and did not have children. (R. 98.) The parole officer also learned that the brother, like petitioner, was a sex offender. (R. 98.) The brother said he would ask the South Carolina Probation Department about the possibility of petitioner living with him. (R. 98.) In a subsequent telephone call, the brother told the parole officer that the probation department did not allow sex offenders to cohabitate. (R. 97.) Petitioner's proposed South Carolina residence was rejected.

In October 2017, DOCCS staff again met with petitioner to request possible residences to investigate. (R. 97.) Petitioner asked to be released to the New York City Department of Homeless Services ("NYCDHS") shelter system, which operates a small number of facilities that comply with the SARA requirement and reserve some beds for use by DOCCS inmates. (R. 5, 97, 140.) However, none of those beds were available. (R. 140.) DOCCS added petitioner's name to its waiting list of inmates seeking SARA-compliant housing at NYCDHS shelters. (R. 140.)

Thereafter, DOCCS staff continued to meet with petitioner and requested additional residences to investigate. (R. 97.) However,

petitioner did not propose any other residences. (R. 97.) Accordingly, he was kept in custody. While waiting for SARA-compliant NYCDHS shelter housing to become available, petitioner was found guilty of multiple disciplinary infractions: one for interference, and another for refusing to obey a direct order. (R. 25.)

D. Supreme Court Denies Habeas Relief and the Third Department Affirms

In November 2017, petitioner filed a petition for writ of habeas corpus against respondents DOCCS and the Superintendent of Adirondack Correctional Facility, where he was being housed, in Supreme Court, Essex County. (R. 1-7.) Petitioner alleged that he was being confined in violation of the federal and New York State constitutional guarantees of substantive due process. (R. 6, 8.) Specifically, he asserted that he had a fundamental right to be released from custody promptly after his August 10, 2017 open date, and that respondents were violating that right by keeping him in custody until he obtained a residence that complied with the SARA residency requirement. (R. 6.) Supreme Court denied the petition. (R. 163-167.)

The Third Department affirmed. (R. 179-193.) The court determined that while petitioner had a liberty interest in being released

on parole promptly after his open date, that interest was "not fundamental" and thus did not implicate any heightened level of scrutiny. (R. 181 [quoting *Myers v. Schneiderman*, 30 N.Y.3d 1, 15, *rearg. denied*, 30 N.Y.3d 1009 (2017)].) Rather, petitioner's liberty interest could be restricted by the requirement that he first obtain SARA-compliant housing so long as that requirement was "rationally related to any conceivable legitimate state purpose." (R. 181 [quoting *Myers*, 30 N.Y.3d at 15 (alteration marks omitted)].)

The court held that, as applied to petitioner, the SARA residency requirement rationally served "the legitimate government interest of protecting 'children from the risk of recidivism by certain sex offenders.'" (R. 181 [quoting *Matter of Devine v. Annucci*, 150 A.D.3d 1104, 1106 (2d Dept. 2017)].) Namely, level-3 sex offenders, like petitioner, are so designated because of "the threat their high risk of reoffense pose[s] to the community" (R. 182 [citing Correction Law § 168-l(6)(c)]), and the SARA residency requirement assists in "keeping [them] at a distance from schoolchildren—thereby limiting opportunities for predation" (R. 182). The court also rejected petitioner's argument that DOCCS failed

to assist him in obtaining SARA-compliant housing as required by Correction Law § 201(5). (R. 183.)

Two justices issued a concurrence commenting on practical difficulties faced by DOCCS inmates seeking placement in the NYCDHS shelter system given the limited availability of that system's SARA-compliant housing. (R. 183-186.)

E. Petitioner's Release on Parole Followed by His Arrest on New Persistent Sexual Abuse Charges

Petitioner appealed from the Third Department's decision to this Court, asserting a right to review under C.P.L.R. 5601(b)(1) on the ground that the case directly involves a constitutional question. (R. 174-178.) Thereafter, in November 2019, petitioner was released from custody. *See* DOCCS, *Inmate Lookup*, http://nysdoccslookup.doccs.ny.gov, under petitioner's 09-A-1104 identification number (last visited Aug. 10, 2020). DOCCS files indicate that he was released upon obtaining a bed in a NYCDHS SARA-compliant shelter.

In December 2019, petitioner was charged with persistent sexual abuse and taken into the custody of the New York City Department of Corrections ("NYCDOC"). *See* NYCDOC, *Inmate Lookup Service*, https://a073-ils-web.nyc.gov/inmatelookup/pages/common/find.jsf, under

petitioner's 3491907235 booking number (last visited Aug. 10, 2020). Petitioner pleaded not guilty and is scheduled to make his next court appearance in September 2020. *See* New York State Unified Court System, *WebCriminal Case Identifier Search*, https://iapps.courts.state.ny.us/webcrim_attorney/CaseIdentifierSearch, under petitioner's 03999-2019 case number (last visited Aug. 10, 2020).

ARGUMENT

POINT I

THE COURT SHOULD DISMISS THIS APPEAL AS MOOT

Petitioner does not deny that this appeal has become moot. The relief petitioner sought in his habeas petition, *i.e.*, release on parole from DOCCS custody, *i.e.*, was ultimately received. And although petitioner has since been taken into local custody, he is being held on new criminal charges—not because of anything having to do with SARA. *See* NYCDOC, *Inmate Lookup Service*, https://a073-ils-web.nyc.gov/inmatelookup/pages/common/find.jsf, under petitioner's 3491907235 booking number. Simply put, there is no longer any live controversy between petitioner and respondents. And petitioner does not deny that moot cases, like this one, ordinarily must be dismissed. He contends, however (Br. 9-10), that

the case comes within the narrow exception allowing moot cases to be adjudicated on the merits. It does not.

The mootness exception only applies when, in addition to all other requirements being satisfied, a case is "of the type that typically evades review" in the courts. *Wisholek v. Douglas*, 97 N.Y.2d 740, 742 (2002); *accord Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 715 (1980). This case is not of that type. It presents the question of whether the SARA residency requirement, as applied to petitioner in a way that prevented him from being released on parole promptly following his open date, violated the federal or state constitutional guarantees of substantive due process. This exact question has already been judicially reviewed, namely by both of the courts below. (R. 163-167 [Supreme Court], 179-187 [Third Department].)

Moreover, similar constitutional challenges to the SARA residency restriction have been and continue to be raised and reviewed in other cases. *See, e.g., Matter of Arroyo v. Annucci*, 61 Misc. 3d 930 (Sup. Ct. Albany County 2018); *Matter of Williams v. Department of Corr. & Community Supervision*, 43 Misc. 3d 356 (Sup. Ct. N.Y. County 2014), *aff'd*, 136 A.D.3d 147 (1st Dept. 2016), *lv. dismissed*, 29 N.Y.3d 990

(2017). This includes challenges involving requests for money damages, which generally remain live for as many available rounds of appellate consideration as the litigants wish to pursue. *See, e.g.*, *Wallace v. State of N.Y.*, 40 F. Supp. 3d 278 (E.D.N.Y. 2014), *appeal dismissed as lacking basis in law or fact*, Case No. 14-3781, Dkt. No. 36 (2d Cir. Jan. 14, 2015) (action under 42 U.S.C. § 1983).

For purposes of the mootness exception, the present case is unlike the substantive due process challenge to the SARA residency requirement that this Court is considering in *People ex rel. Ortiz v. Breslin*, APL-2020-00087. Unlike this case, the constitutional challenge in *Ortiz* is properly decided under the mootness exception.

In *Ortiz*, an inmate covered by SARA who was serving a determinate sentence had completed the sentence's prison term and was approved to begin the subsequent term of post-release supervision ("PRS"). 183 A.D.3d 577, 578 (2d Dept. 2020). However, he failed to obtain SARA-compliant housing, so he was sent to begin his PRS in a residential treatment facility ("RTF")—a residence within a correctional facility where employment, educational, and training opportunities are available, *see* Correction Law § 2(6)—until compliant housing could be

found. 183 A.D.3d at 578. In the interim, he filed a habeas petition alleging that DOCCS's reliance on Correction Law § 73(10) to facilitate compliance with the SARA residency requirement, as applied to him, denied him substantive due process. *Id.* After he was released some months later to serve the remainder of his PRS in the community and the case became moot, the Second Department reviewed the merits of his challenge under the mootness exception. *Id.* at 578-579.

Petitioner, unlike the inmate in *Ortiz*, has not completed his prison term. He was instead granted discretionary parole release from an indeterminate sentence. He thus falls into a lower-priority group on DOCCS's waiting list for the limited number of SARA-compliant shelter beds provided each month by NYCDHS. Accordingly, because inmates like petitioner might need to wait longer for a shelter bed to become available, their challenges are not likely to evade review. (*See infra* pp. 39-40.)

In conclusion, the mootness exception is inapplicable to the present case. The undisputedly-moot appeal should therefore be dismissed.

POINT II

IF THE COURT REACHES THE MERITS, IT SHOULD AFFIRM BECAUSE RESPONDENTS' APPLICATION OF THE SARA RESIDENCY REQUIREMENT TO PETITIONER COMPORTED WITH SUBSTANTIVE DUE PROCESS

A. Petitioner's Liberty Interest in Parole Release Did Not Implicate a Federal Constitutional Fundamental Right.

The Fourteenth Amendment to the United States Constitution provides that no state may "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1. In addition to ensuring that these interests not be deprived without adequate procedures, the provision also has a substantive component—"substantive due process"—that affords a measure of protection from deprivation regardless of the procedures used. *See Mark G. v. Sabol*, 93 N.Y.2d 710, 723 (1999).

Substantive due process affords the greatest protection to "fundamental rights": liberty interests "which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality op.), and *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)); *accord People v.*

Knox, 12 N.Y.3d 60, 67, *cert. denied*, 558 U.S. 1011 (2009). Restrictions on fundamental rights are subject to strict scrutiny and thus must be "narrowly tailored to serve a compelling state interest." *Glucksberg*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). With one possible exception that does not apply here (*see infra* pp. 22-25), restrictions on liberty interests that do not rise to the level of fundamental rights need only be "rationally related to legitimate government interests." *Id.* at 728; *accord Myers*, 30 N.Y.3d at 15.

While an inmate who has received an open parole date does acquire a liberty interest in release such that his open date may not be rescinded without due process, *see Victory v. Pataki*, 814 F.3d 47, 61 (2d Cir. 2016), his legitimate expectancy of release upon reaching that date is conditioned on compliance with New York's regulatory scheme. And this scheme includes, among other things, the requirement of Executive Law § 259-c(14) of SARA that a parolee who is a level-3 sex offender and is serving a sentence for an offense enumerated in that provision not reside within 1,000 feet of a school. Accordingly, as explained in more detail immediately below, so long as petitioner remained subject to lawful sentence of imprisonment, he had no fundamental right to be released on

parole before obtaining housing that complied with the SARA residency requirement. And as explained subsequently (*infra* pp. 25-37), the application of that requirement to petitioner comported with substantive due process because it was rationally related to a legitimate governmental interest.

Fundamental rights "are created only by the Constitution." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring); *accord, e.g.*, *Steele v. Cicchi*, 855 F.3d 494, 501 (3d Cir. 2017); *Kendall v. Balcerzak*, 650 F.3d 515, 528 (4th Cir.), *cert. denied*, 565 U.S. 943 (2011); *Graves v. Thomas*, 450 F.3d 1215, 1220 (10th Cir. 2006); *Wooten v. Campbell*, 49 F.3d 696, 699, *reh'g denied*, 58 F.3d 642 (11th Cir.), *cert. denied*, 516 U.S. 943 (1995). And inmates have "no constitutional or inherent right" to be "released before the expiration of a valid sentence." *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979); *accord Matter of Russo v. New York State Bd. of Parole*, 50 N.Y.2d 69, 73 (1980). "Given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." *Greenholtz*, 442 U.S. at 7 (quoting *Meachum v. Fano*, 427 U.S. 215 (1976) [alteration marks omitted]).

Nor is parole release otherwise "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 721. The concept of parole was unknown to the framers, having emerged first in the mid-1800s in Australia and Ireland. Edward E. Rhine, *The Present Status and Future Prospects of Parole Boards and Parole Supervision*, in *The Oxford Handbook of Sentencing and Corrections* 627, 629 (Joan Petersilia & Kevin R. Reitz, eds. 2012) [hereinafter Rhine, *Parole Boards and Parole Supervision*]. Parole was not introduced in United States until the late 1800s, and it did not achieve nationwide use until the 1940s. *Id.* at 630. Even as late as 1950, parole was regarded by some as a "relatively new device." *Lilley v. Platt*, 17 Conn. Supp. 101, 104 (Conn. Super. Ct. 1950).

Moreover, the availability of parole release in the United States has waxed and waned over time. For example, a "movement to abolish parole" began in the 1970s and "continued unabated through the 1990s." Rhine, *Parole Boards and Parole Supervision*, at 631. During that time, "all 50 states, the District of Columbia, and the federal government revised or considered replacing" their parole systems. *Id.* The existence of such a widespread movement is inconsistent with the notion that parole is so

integral a component of the criminal justice system that "neither liberty nor justice would exist" if it were eliminated. *Glucksberg*, 521 U.S. at 721.

In sum, petitioner had no fundamental right to be released on parole before the expiration of his sentence.

Petitioner's counterarguments are meritless. The liberty interest in freedom from confinement that "derives from the Due Process Clause itself" (Br. 12) is the one possessed by persons who are not subject to a valid sentence of imprisonment. As the cases petitioner cites indicate, that interest is not the more limited one possessed by lawfully-convicted prison inmates. *See Flores*, 507 U.S. at 294 (alien juveniles who are not accompanied by their parents or other related adults); *Foucha v. Louisiana*, 504 U.S. 71, 73 (1992) (criminal defendants who are found not guilty by reason of mental defects); *United States v. Salerno*, 481 U.S. 739, 741 (1987) (criminal defendants awaiting trial); *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989) (children in parents' custody). To be sure, inmates have a fundamental right to be free from restraints that are not "within the sentence imposed," such as prolonged solitary confinement. *Sandin v. Conner*, 515 U.S. 472, 498 (1995) (quoting *Hewitt v. Helms*, 459 U.S. 460, 468 (1983)). But they have

no fundamental right to be free from restraints that are part and parcel of that sentence, like incarceration itself.

The cases recognizing inmates' liberty interest in being released on parole promptly after their open date (Br. 13-14) confirm that this interest is not a fundamental right. Those cases explain that the interest is "grounded in New York's regulatory scheme," *Victory*, 814 F.3d at 60, and thus does not arise from the United States Constitution. Further, the cases address only *procedural* due process—which protects liberty interests without regard to whether they are fundamental, and ensures only the use of adequate procedures before a deprivation may occur. *See Morrissey v. Brewer*, 408 U.S. 471, 490 (1972); *Victory*, 814 F.3d at 62-63; *Green v. McCall*, 822 F.2d 284, 294 (2d Cir. 1987); *Matter of Rizo v. New York State Bd. of Parole*, 251 A.D.2d 997, 998 (4th Dept.), *lv. denied*, 92 N.Y.2d 811 (1998). These procedural due process cases are inapposite with respect to petitioner's substantive due process challenge.

B. To Pass Federal Constitutional Muster, the SARA Residency Requirement as Applied to Petitioner Need Only Have Had a Rational Basis.

Because petitioner's liberty interest in being released on parole promptly after his open date did not rise to the level of a fundamental

right, the requirement that he had to obtain a SARA-compliant residence before he could be released is not subject to strict scrutiny, and thus need not have been narrowly tailored to serve a compelling governmental interest. Rather, the SARA residency requirement need only have been rationally related to a legitimate governmental interest. In particular, petitioner is mistaken in his contention (Br. 21-22) that, in the absence of strict scrutiny, the applicable standard is the intermediate scrutiny regime of *Anonymous v. City of Rochester*, 13 N.Y.3d 35 (2009), under which the SARA residency requirement would have had to further an important governmental interest.

Preliminarily, the intermediate scrutiny regime of *Anonymous*, which the Court applied to invalidate a juvenile curfew, might no longer be good law following the Court's more-recent decision in *Myers*. *Myers* dealt with terminally ill persons' liberty interest in receiving "aid-in-dying," which the Court determined did not rise to the level of a fundamental right. 30 N.Y.3d at 14-15. Having so held, the Court concluded that "*therefore* the assisted suicide statutes need only be rationally related to a legitimate government interest." *Id.* at 15

(emphasis added). The Court did not consider an alternative level of scrutiny, intermediate or otherwise.

That said, even if the *Anonymous* regime remains good law, it nevertheless does not apply here. *Anonymous* applied intermediate scrutiny to a curfew restricting children's liberty interest in freedom of movement. 13 N.Y.3d at 45. The reason for declining to apply strict scrutiny was that while freedom of movement is "no doubt . . . fundamental" for adults, so that any adult curfew must pass strict scrutiny, children's "immaturity, vulnerability, and need for parental guidance" justified the government's "exercising broader authority over their activities" than strict scrutiny allowed. *Id.* at 45-46. That is, the children's liberty interest would have been a fundamental right but for their age.

The present case is completely different. Petitioner's liberty interest in being released on parole is not an interest that would have risen to the level of a fundamental right but for certain of his biographical characteristics. Rather, so long as petitioner remained subject to a lawful sentence of imprisonment, he had no fundamental right to parole release under any circumstances. (*See supra* pp. 17-22.) Accordingly, even if

Anonymous remains good law in general, it does not support the application of intermediate scrutiny here.

C. The SARA Residency Requirement Was Rationally Related to the Legitimate Governmental Interest in Protecting Children from Sex Crimes.

Under rational basis review, the requirement that petitioner had to obtain a residence complying with the SARA school-grounds condition before being released on parole need only have been "rationally related to a legitimate government interest." *Myers*, 30 N.Y.3d at 15. Notably, "any conceivable legitimate State purpose" will suffice. *Id.* (quoting *People v. Walker*, 81 N.Y.2d 661, 668 (1993)), and a rational connection to that purpose may be founded upon "rational speculation unsupported by evidence or empirical data," *Affronti v. Crosson*, 95 N.Y.2d 713, 719 (2001), *cert. denied sub nom., Affronti v. Lippman*, 534 U.S. 826 (2001) (quoting *Port Jefferson Health Care Facility v. Wing*, 94 N.Y.2d 284, 291 (1999), *cert. denied*, 530 U.S. 1276 (2000) [emphasis omitted]). Further, petitioner "bears the heavy burden" of proving that the SARA requirement lacks a rational basis; respondents do not bear the burden of proving that it has one. *Myers*, 30 N.Y.3d at 15 (quoting *Knox*, 12 N.Y.3d at 69).

Petitioner has not met his heavy burden. The SARA residency requirement was rationally related to the legitimate purpose of protecting children from sex crimes, *Knox*, 12 N.Y.3d at 67, because it was rational to regard petitioner as posing a risk of committing sex crimes against children, and it was rational to regard the SARA requirement—that he not be released on parole until he obtained a residence not located within 1,000 feet of any school—as mitigating that risk. *See Wallace*, 40 F. Supp. 3d at 329 n.47 (rejecting a similar constitutional challenge to the SARA residency requirement); *see also, e.g.*, *Weems v. Little Rock Police Dept.*, 453 F.3d 1010, 1015 (8th Cir. 2006), *reh'g denied sub nom.*, *Weems v. Johnson*, 2006 U.S. App. LEXIS 21238 (8th Cir. Aug. 16, 2006), *cert. denied*, 550 U.S. 917 (2007) (rejecting a similar constitutional challenge to another residency requirement).

1. Petitioner Was Rationally Regarded as Posing an Appreciable Risk of Committing Sex Crimes Against Children.

It was rational to regard petitioner as posing an appreciable risk of committing sex crimes against children on the basis of his designation as a level-3 sex offender under SORA. A level-3 designation indicates that an offender's "risk of repeat offense is high and there exists a threat to

the public safety." Correction Law § 168-l(6)(c). It signifies that the offender is among those who are "most likely to re-offend in general" and thereby place both adults and children in danger. *Wallace*, 40 F. Supp. 3d at 320; *see id.* at 311.

The level-3 designation is a particularly robust and durable indicator of this likelihood. The sentencing court may designate a sentenced sex offender level 3 only after it receives an expert recommendation prepared by the New York State Board of Examiners of Sex Offenders, a panel of experts in the field of behavior and treatment of sex offenders, *id.* § 168-l(1), (6); holds an adversarial hearing at which the district attorney and the offender are invited to respond to the board's recommendation, *id.* § 168-n(3); and concludes that the designation is warranted by clear and convincing evidence, *id.* Once imposed, a level-3 designation stays in effect unless and until, upon the offender's application, the court finds that clear and convincing evidence warrants a modification. *Id.* §§ 168-h(2), 168-o(2). By giving level-3 sex offenders the opportunity to make such applications as often as annually, the statutory scheme ensures a measure of confidence that the designation remains appropriate for as long as it is in effect. *See Wallace*, 40 F. Supp.

3d at 311, 325 (explaining that level-3 sex offenders pose "a perpetual threat of re-offending" and "a perpetual risk to public safety").

Petitioner had been designated a level-3 sex offender by the time the Parole Board granted him parole subject to the SARA residency requirement. (R. 19.) And he has remained a level-3 sex offender ever since. Accordingly, it was rational to regard him as posing a high risk of recidivism and a threat to public safety generally, and therefore as posing an appreciable risk of committing sex crimes against children.

Petitioner argues that, notwithstanding his level-3 designation, other evidence shows that he presented a low risk of committing any more sex crimes, and "a lack of risk" (Br. 20)—*i.e.*, "no risk" (Br. 19)—of committing sex crimes against children. This argument is unavailing, for two overarching reasons.

First, even if petitioner is correct that *some* level-3 sex offenders can be said to pose a low risk of committing future sex crimes against anyone and no risk of committing sex crimes against children, the Legislature acted rationally in not exempting any such persons from the SARA requirement. The Legislature could have reasoned that persons fitting that description "are few" and the process of identifying them "is

difficult, cumbersome and prone to error." *Knox*, 12 N.Y.3d at 69 (rejecting as-applied substantive due process challenge to SORA). In enacting SARA as it did, the Legislature thus could rationally have concluded that "a hard and fast rule, with no exceptions" based upon an individualized inquiry into dangerousness to children, was warranted. *Id.*

Second, petitioner's argument fails on its own terms. In light of his level-3 designation, the evidence to which he points does not render irrational the conclusion that he posed a risk of committing sex crimes against children.

The fact that petitioner was almost 60 years old by the time of his open date (Br. 19-20) did not make it irrational to think that he continued to pose the high risk of recidivism and threat to public safety that his level-3 designation reflected. As petitioner points out (Br. 19), the literature does suggest that, in general, sex offenders' likelihood of recidivism decreases with age. But petitioner's likelihood of recidivism almost certainly exceeded his age-group's average, seeing as

- petitioner was a serial sex offender, having committed more than 20 sex crimes over the years (R. 19-20),

- petitioner's modus operandi—approaching women in public places and rubbing his penis against them—did not require the sort of physical exertion that becomes more difficult with advancing age (R. 19-20, 78), and

- petitioner in fact engaged in that behavior just before turning 50, in the incident that gave rise to the incarceration from which he sought to be released on parole (R. 19, 68).

One could therefore conclude that, in light of petitioner's level-3 designation, his risk of recidivism remained high and he remained a threat to public safety. *See People v. Charles*, 162 A.D.3d 125, 140 (2d Dept.), *lv. denied*, 32 N.Y.3d 904 (2018) ("The fact that the defendant is in his 70s, without more, does not constitute clear and convincing evidence to warrant a modification [of his level-3 designation], especially since the defendant committed the instant sexual offenses when he was already in his 50s.").

It likewise was rational to treat petitioner as someone whose risk of recidivism remained high, and who remained a threat to public safety, notwithstanding his participation in prison sex offender treatment programs and maintenance of a disciplinary record free of sexual infractions while incarcerated. (*See* Br. 19.) Although these positive accomplishments could have reflected a desire on petitioner's part to reform his behavior, they also could have merely reflected the

consequences of being confined in a correctional facility, where attendance at treatment programs can be readily enforced and where the type of victims against which petitioner tended to sexually offend—women in tight skirts or tight pants (R. 19-20, 74-75, 78)—are not generally present. *See People v. Meckwood*, 20 N.Y.3d 69, 73-74 (2012) (finding that inmates' good behavior during incarceration is rationally regarded as less meaningful than their "good behavior during the time in which they are released and living in society"). Thus, petitioner's relatively good behavior while incarcerated was "not necessarily predictive of his behavior when no longer under such supervision." *People v. Parilla*, 109 A.D.3d 20, 31 (1st Dept.), *lv. denied*, 21 N.Y.3d 865 (2013) (quoting *People v. Gonzalez*, 48 A.D.3d 284, 285 (1st Dept. 2008), *lv. denied*, 10 N.Y.3d 711 (2008)) (upholding a level-3 designation); *accord, e.g.*, *People v. Hackrott*, 170 A.D.3d 1646, 1647 (4th Dept.), *lv. denied*, 33 N.Y.3d 908 (2019) (same); *People v. Benson*, 132 A.D.3d 1030, 1031 (3d Dept.), *lv. denied*, 26 N.Y.3d 913 (2015) (same); *see also, e.g.*, *People v. Moultrie*, 147 A.D.3d 800, 801 (2d Dept.), *lv. denied*, 29 N.Y.3d 908 (2017) (upholding a level-2 designation).

Moreover, petitioner's disciplinary record was not uniformly positive. While waiting for SARA-compliant NYCDHS shelter housing to become available, petitioner was found guilty of multiple disciplinary infractions, one for interference, and another for refusing to obey a direct order. (R. 25.) Based on this misbehavior, one could rationally speculate that petitioner had not developed the sort of coping mechanisms he would have needed in order to control his impulses while on parole in the community.

The favorable COMPAS scores that petitioner received shortly before his Parole Board appearance did not make it irrational to think that he still posed a high risk of reoffense and a threat to public safety. (*See* Br. 19.) Initially, to the extent the Parole Board placed any weight on petitioner's COMPAS in granting him parole, it did so on the understanding that his release would be subject to SARA residency requirement; there is no dispute that petitioner satisfied the relevant statutory criteria. Moreover, the COMPAS, while useful, has never been regarded as an infallible predictor of recidivism. It serves to "assist" in determining the likelihood of recidivism, Executive Law § 259-c(4), but it is not conclusive on that issue. Among other things, the COMPAS is a

computer program, and it relies in part upon inmates' subjective views of their own relevant strengths and weaknesses. Caher, *Risk Assessment Rule.*

By contrast, petitioner's level-3 designation is the product of judicial factfinding based upon evidence and argument vetted in an adversarial process. Correction Law §§ 168-l(1), (6), 168-n. Accordingly, that judicial determination could rationally be regarded as a more accurate risk appraisal than the COMPAS score. *See, e.g., People v. Wheeler*, 144 A.D.3d 1341, 1342 (3d Dept. 2016) (affirming an individual's designation as a level-3 sex offender notwithstanding that he was scored a "medium-low risk of recidivism" on the Static-99, an actuarial assessment similar to COMPAS). Indeed, subsequent events would go on to confirm as much: Shortly after his parole release, petitioner was rearrested and charged with committing persistent sexual abuse yet again, *see* NYCDOC, *Inmate Lookup Service*, https://a073-ils-web.nyc.gov/inmatelookup/pages/common/find.jsf, under petitioner's 3491907235 booking number, despite the COMPAS assessment that his risk of arrest was low. (R. 75.)

Finally, petitioner was rationally regarded as posing an appreciable risk of committing sex crimes against children, notwithstanding that his extensive criminal record contained only sex crimes against adults. Experts have opined that, over time, sex offenders may "cross over" from one type of victim to another, including from adults to children. *See Doe v. Miller*, 405 F.3d 700, 722 (8th Cir. 2005), *reh'g denied*, 2005 U.S. App. LEXIS 13115 (8th Cir. June 30, 2005), *cert. denied*, 546 U.S. 1034 (2005). Indeed, according to one study of men who have committed multiple sex crimes, "offenders who abused an adult" at first "tend to switch to adolescent victims" later. Patrick Lussier et al., *Generality of Deviance and Predation: Crime-Switching and Specialization Patterns in Persistent Sexual Offenders*, in *Violent Offenders: Theory, Research, Policy, and Practice* 97, 114 (Matthew DeLisi & Peter J. Conis, eds. 2008).

Moreover, the cognitive process behind petitioner's pattern of sexually offending undercuts his assertion that he posed a risk of reoffending against adults only. In describing his past crimes, petitioner explained to the Parole Board that "if I see a woman wearing a tight dress or tight pants, in my mind I was thinking she wants a strange man or someone to rub up against her." (R. 74-75.) That explanation suggests

that petitioner might have had the same misconception about school-age, adolescent girls similarly attired.

In short, petitioner has not identified any evidence sufficient to render irrational the conclusion that his level-3 sex offender designation indicated a risk of recidivism not only against adults but against children, as well.

2. The SARA Residency Requirement Was Rationally Regarded as Mitigating the Risk Petitioner Posed.

As shown above, petitioner was rationally regarded as posing an appreciable risk of committing sex crimes against children—particularly, given his history, adolescent girls. And SARA's school-grounds condition, which prevented petitioner's release until he obtained a residence further than 1,000 feet from any school, was rationally regarded as mitigating that risk by reducing the possibility that he might encounter children and victimize them.

Petitioner complains that, in practice, the "broad sweep of SARA's restrictions" has "questionable effectiveness" that is "not born[e] out by empirical research." (Br. 19, 23; *see also* Br. 16-18.) But this quarrel presents at most a policy question for the Legislature. The rationality of the SARA residency requirement may be supported by "rational

speculation unsupported by evidence or empirical data." *Affronti*, 95 N.Y.2d at 719. And with respect to the relative efficacy of the SARA residency requirement as compared with other potential child-protection measures, the courts' role in performing rational basis review "is not to second-guess the legislative policy judgment by parsing the latest academic studies." *Vasquez v. Foxx*, 895 F.3d 515, 525 (7th Cir. 2018), *reh'g denied*, 2018 U.S. App. LEXIS 22626 (7th Cir. Aug. 14, 2018), *cert. denied*, 139 S. Ct. 797 (2019).

Moreover, petitioner's complaint about the general efficacy of the SARA residency requirement does not support his claim, which challenges the requirement as applied to him specifically. In particular, petitioner's contention that residency restrictions are ineffective because most sex crimes against children are committed by people who already know them (Br. 19 & n.7) is of limited relevance. To be sure, residency restrictions might not protect children against offenders who gain access to their victims via social or familial relationships. But petitioner's victims were strangers—persons to whom he gained access simply by encountering them in a public place. Those are the kind of victims that residency restrictions can readily protect. Indeed, even some researchers

who are generally skeptical of residency restrictions advocate for governments to "apply them only to those offenders who offend against strangers," like petitioner, rather than eliminate them altogether. Melanie Clark Mogavero & Leslie W. Kennedy, *The Social and Geographic Patterns of Sexual Offending: Is Sex Offender Residence Restriction Legislation Practical?*, 12 Victims & Offenders 401, 427 (2017).

For these reasons, the application of SARA's residency requirement to petitioner was rationally related to a legitimate government interest.

D. DOCCS Satisfied Its Duty to Assist Petitioner in Obtaining SARA-Compliant Housing, But Even a Breach Would Not Have Rendered the Residency Requirement Irrational.

Petitioner contends (Br. 25-31) that DOCCS failed to assist him in obtaining SARA-compliant housing as required by Correction Law § 201(5). However, petitioner does not present this contention as a claim separate from his substantive due process challenge. (*See* Br. 2 [statement of question presented to this Court]; *see also* Petr. 3d Dept. Br. 1 [statement of question presented to Third Department]; R. 8 [statement of point presented to Supreme Court].) And according to the above analysis (*supra* pp. 17-37), regardless of whether DOCCS had

breached its section 201(5) duty to assist petitioner in his housing search, respondents still would have acted rationally in applying the SARA residency requirement to deny him release on parole until compliant housing was obtained. Accordingly, petitioner's substantive due process claim would still fail.

Regardless, petitioner's contention is without merit because DOCCS did satisfy its section 201(5) duty to petitioner. Section 201(5) obligates DOCCS to "assist inmates eligible for community supervision and inmates who are on community supervision to secure employment, educational or vocational training, and housing." This language imposes only a duty "to provide assistance in a general manner," which is satisfied when DOCCS "provides the inmates with adequate resources to allow them to propose residences for investigation and approval" and then "actively investigates" for suitability any residences the inmates might thereafter propose. *Matter of Gonzalez v. Annucci*, 32 N.Y.3d 461, 473-474 (2018). That assistance was provided to petitioner here.

DOCCS provided petitioner with resources sufficient to allow him to propose two residences for investigation and approval: his brother's home in South Carolina and the NYCDHS shelter system. And DOCCS

actively investigated those residences. In connection with the proposed South Carolina residence, a DOCCS parole officer contacted petitioner's brother multiple times by telephone; obtained a variety of relevant details, including that the brother, like petitioner, was a sex offender; and learned that the South Carolina Probation Department would not allow sex offenders to cohabitate. (R. 97-98.) As to the NYCDHS shelter system, DOCCS learned that none of the SARA-compliant beds that NYCDHS reserved for DOCCS inmates were immediately available and placed petitioner's name on the waiting list. (R. 140.) Indeed, petitioner was eventually released on parole, *see* DOCCS, *Inmate Lookup*, http://nysdoccslookup.doccs.ny.gov, under petitioner's 09-A-1104 identification number, and DOCCS files indicate that his release was to a SARA-compliant NYCDHS shelter bed obtained through the waiting list.

Additionally, contrary to petitioner's contention (Br. 26), it was not unreasonable for DOCCS to operate the waiting list for SARA-compliant NYCDHS housing in a manner that gave preference to inmates who had completed determinate terms of imprisonment and were in RTFs while serving their subsequent terms of PRS. That preference is rational

because inmates on PRS have completed their prison terms, and thus have a greater expectation of being released into the community than do inmates who are serving indeterminate prison terms and have been granted discretionary parole but are unable to satisfy their parole conditions.

E. The Rationality of SARA's Residency Requirement Shows that Petitioner Was Likewise Afforded the Substantive Due Process Guaranteed by the State Constitution.

The Due Process Clause of the New York State Constitution, like the federal constitution, provides: "No person shall be deprived of life, liberty or property without due process of law." N.Y. Const, art. I, § 6. Petitioner correctly notes (Br. 20-21) that although the state Due Process Clause is essentially identical to its federal counterpart, it is more protective in certain situations. But he does not explain why the present case might be one of those situations. That is, he does not articulate why the state constitutional guarantee of substantive due process was supposedly violated even if, as demonstrated above (*supra* pp. 17-40), the federal constitutional guarantee of substantive due process was not.

The three cases he cites on the issue are inapposite. The question presented in *People v. LaValle*, 3 N.Y.3d 88, 131 (2004), involved

procedural due process, specifically whether certain instructions given to a jury deliberating on a possible death sentence resulted in an "unconstitutional sentencing procedure." And the other two cases addressed the additional substantive protection the New York State Due Process Clause provides to prisoners' exercise of fundamental rights, specifically in contexts where, under federal law, restrictions on those rights are not reviewed under strict scrutiny. *See Lucas v. Scully*, 71 N.Y.2d 399, 402 (1988) (freedom of expression); *Cooper v. Morin*, 49 N.Y.2d 69, 80 (1979), *rearg. denied*, 49 N.Y.2d 801, *cert. denied sub nom.*, *Lombard v. Cooper*, 446 U.S. 984 (1980) (marriage, child-rearing, and family integrity).

Those cases give no reason to doubt that, under the analytical framework that is generally common to the federal and state due processes clauses alike, *see Hernandez v. Robles*, 7 N.Y.3d 338, 362 (2006), petitioner's liberty interest in being released on parole promptly after his open date did not rise to the level of a fundamental right, and the requirement that he was not to be released until he obtained a SARA-compliant residence passes muster because it had a rational basis.

CONCLUSION

The decision of the Third Department should be affirmed.

September 3, 2020

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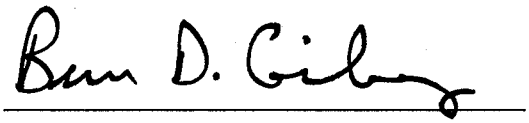
By: 

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CERTIFICATE OF COMPLIANCE

I hereby certify that the body of the foregoing Corrected Brief for Respondents contains 7,928 words and thus complies with the word limit set by 22 N.Y.C.R.R. § 500.13(c)(1).

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